The way to resolve such disputes is by a suit to compel arbitration." (App. 6). According to the Court, Petitioner did not seek the proper remedy when she filed suit in the District Court. "Where all an employee shows is the need for judicial help in compelling arbitration, the repudiation exception does not apply. A federal court may compel arbitration at the employee's (or the union's) request, but it may not intrude upon the adjustment board's authority by deciding the merits of the collective bargaining agreement dispute." (App. 7).

Petitioner timely filed Appellant's Petition for Panel Rehearing with the Court of Appeals. (App. 28-35). In her petition for rehearing, Petitioner asked the Court, pursuant to Rule 40(a)(4)(A) of the Federal Rules of Appellate Procedure, to grant the petition without reargument and remand the case to the District Court to consider whether she should be permitted to amend her complaint so as to request the District Court to compel AA to submit to arbitration her claim that she is entitled to employment by AA.[4] (App. 28-29). In her petition for rehearing, Petitioner pointed out that, under the state of the law, it was unclear whether an individual employee, separate and apart from his or her union, had the legal right to file a suit seeking to compel arbitration under a collective bargaining agreement. (App. 33-34).

On August 15, 2005, the Court of Appeals, without comment or opinion, denied Petitioner's petition for panel rehearing. (App. 27).

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[4] In the alternative, Petitioner asked the Court of Appeals to remand the case to the District Court with instructions that Petitioner be permitted to so amend her complaint. (App. 29).

REASONS FOR GRANTING THE WRIT

1. This case presents the important issue of whether a Railway Labor Act plaintiff may sue her employer in federal court on the merits of her dispute, or whether her sole remedy is an order compelling arbitration, where the employer refuses to arbitrate her grievance on the basis of its contention that the plaintiff is not covered by the collective bargaining agreement.

This Court should hear this case in order to resolve an important issue left open by this Court's decision in *Vaca v. Sipes*, 386 U.S. 171 (1967). Moreover, the decision of the Court of Appeals herein is directly contrary to decisions on this issue of the Courts of Appeals for the First, Fifth and Ninth Circuits.

In *Vaca*, the Court, relying on *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 652-53 (1965), considered it settled law that an "employee must at least attempt to exhaust exclusive grievance and arbitration procedures established by the bargaining agreement." *Vaca*, 386 U.S. at 184. The Court defined the "problem" as determining under what circumstances an "individual employee" may obtain judicial review of his "breach-of-contract claim despite his failure to secure relief through the contractual remedial procedures." *Id.* at 185. The Court noted "an obvious situation" in which the employee should not be limited to the contract's exclusive remedial procedures: "when the conduct of the employer amounts to a repudiation of those contractual procedures." *Id.*

Less than a year later, the Court identified "another of the most obvious exceptions to the exhaustion requirement – the situation where the effort to proceed formally with

contractual or administrative remedies would be wholly futile." *Glover v. St. Louis-San Francisco Railway Co.*, 393 U.S. 324, 330 (1969).

Despite literally thousands of citing references to *Vaca*, the circumstances under which the courthouse door is open to individual employees, and for what kind of review and type of relief, remain unclear. This case merits review because of the varying results reached by the Court of Appeals below, on the one hand, and other Courts of Appeals, on the other, as to whether the employer's refusal to participate in grievance and arbitration procedures under a collective bargaining agreement ("CBA") allows the employee to litigate on the merits in federal court. In the case at bar, it is undisputed that Petitioner and her union tried mightily to utilize the grievance and arbitration mechanism of the collective bargaining agreement. It is also undisputed that AA steadfastly refused to participate.

At least three Circuits support litigation on the merits of an employee-employer dispute under the repudiation exception of *Vaca* in situations substantially similar to that of the case at bar. In *Sidhu v. Fletco Co., Inc.*, 279 F.3d 896 (9th Cir. 2002), former employee Sidhu's grievance alleged that Fletco violated the section of the CBA governing when employees may return to work after leaving for medical reasons. The union requested that the grievance be resolved pursuant to the grievance procedures in the CBA; Fletco refused. The union repeatedly demanded arbitration of the matter, yet Fletco maintained its position that the grievance was without merit and the arbitration clause did not apply to Sidhu. The union filed suit under § 301 of the Labor Management Relations Act. Fletco contended that Sidhu was not excused from the

exhaustion requirement because the union's suit did not seek to compel arbitration. The Court noted that according to the terms of the CBA, a request for arbitration represents the final step in the grievance procedure. Sidhu, through the union, had requested and demanded arbitration proceedings, which the company refused. The Court held that Sidhu exhausted all of the procedures contained in the CBA, which did not include legal action to compel arbitration. The Ninth Circuit viewed the employer's responses as repudiation, rendering Sidhu's claim ripe for decision.

Similarly, in *Meredith v. Louisiana Federation of Teachers*, 209 F.3d 398 (5th Cir. 2000), employee Meredith's allegations included breach of the CBA. A jury awarded damages to Meredith and defendants appealed. The employer argued that although Meredith had pursued the first two steps of the grievance procedures in the CBA, the district court lacked jurisdiction over Meredith's claim for breach of the CBA because she did not exhaust her administrative remedies by seeking to compel arbitration. In its *de novo* review of subject matter jurisdiction, the Court, citing *Vaca*, stated that federal courts lack jurisdiction to decide cases alleging violations of a CBA under the Labor Management Relations Act by an employee against his employer unless the employee has exhausted contractual procedures for redress; however, when an employer refuses to use the procedures set forth in the CBA, the employee need not seek to compel arbitration. The Fifth Circuit agreed with the district court that the employer was estopped from raising the defense of non-exhaustion of remedies because it repudiated contractual procedures when it claimed that Meredith was not covered by the CBA.

Finally, in *Cabarga-Cruz v. Fundacion Educativa Ana Go Mendez, Inc.*, 822 F.2d 188 (1st Cir. 1987), a teacher brought an action against his former employer, an educational foundation, alleging wrongful discharge in violation of a CBA. It was undisputed that Cabarga had not exhausted the grievance remedies. The district court concluded that exhaustion was not required because Cabarga had proved repudiation and the First Circuit affirmed. In support of that conclusion, the appeals court referenced both the employer's insistence that Cabarga was not covered by the CBA and its failure to attempt to resolve Cabarga's grievance through the grievance and arbitration committee.

In stark contrast, the Court of Appeals in the case at bar held that AA's refusal to process grievances and participate in arbitration did not constitute repudiation of the CBA. The Court held that Petitioner could not bring her claim to federal court for a decision on the merits. The Court held that Petitioner's sole remedy was a suit to compel arbitration.[6]

This Court should hear this case to resolve the conflict and decide this important question of federal labor law.

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[6] The parties did not brief this issue either before the District Court or at the Court of Appeals. Instead, the Court of Appeals reached this result *sua sponte*. For this reason Petitioner respectfully suggests that this Court may wish to consider granting the instant petition for writ of certiorari, vacating the Court of Appeals' decision and remanding for further proceedings, such as briefing and argument at either the District Court or Court of Appeals level.

2. This case presents the important issue of whether a Court of Appeals should remand a case to the District Court so as to allow a plaintiff to request leave to amend her complaint to seek a particular remedy, where the Court of Appeals, *sua sponte*, states that the plaintiff sought the wrong remedy but the law was unsettled as to whether plaintiff had standing to seek the remedy which the Court of Appeals says the plaintiff should have sought.

Simple fairness underlies Petitioner's contention that this Court should grant a writ of certiorari to review the Court of Appeals' refusal to remand the instant case to the District Court for the purpose of allowing Petitioner to amend her complaint, or at least seek leave to amend her complaint, to pray for an order compelling AA to submit to arbitration. The Court of Appeals declared such an order to be Petitioner's sole remedy, but the law, prior to that pronouncement, was unclear as to whether Petitioner could, in fact, seek such relief.

Several important and well-established principles support Petitioner's position on this question and make this issue worthy of this Court's consideration. First, this Court's opinions reveal a distinct preference that cases be decided on their merits, rather than on the state of a party's pleadings. "If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits." *Foman v. Davis*, 371 U.S. 178, 182 (1962). *See also Gillespie v. United States Steel Corp.*, 379 U.S. 148, 158 (1964) ("the issue whether the decedent's estate could recover here for pain and suffering prior to death should

not have been decided finally by the Court of Appeals on the basis of mere pleading").

Similarly, the Federal Rules of Civil Procedure provide that leave to amend pleadings "shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). "[T]his mandate is to be heeded." *Foman*, 371 U.S. at 182. *See also Nebraska v. Wyoming*, 515 U.S. 1, 8 (1995) (noting "the solicitude for liberal amendment of pleadings animating the Federal Rules of Civil Procedure"); *Gillespie*, 379 U.S. at 158 (noting "liberality in allowing amendment of pleadings to achieve the ends of justice").

The course of the proceedings in the case at bar ran afoul of these principles. In this case, the District Court held that Petitioner could obtain no relief under the Act because Petitioner was never an "employee" of AA, and the Act only covers disputes between an "employee" and his or her employer. The Court of Appeals affirmed the District Court's decision, but on grounds completely different from those relied upon by the District Court. The Court of Appeals never reached the question of whether Petitioner constituted an "employee" under the Railway Labor Act. Instead, the Court, *sua sponte*, held that the dispute between Petitioner and AA constituted a dispute as to arbitrability and that Petitioner's sole remedy would be to ask the federal court to compel AA to arbitrate with her. The Court noted that Petitioner did not seek that relief in her suit filed in the District Court and affirmed the District Court's grant of summary judgment against Petitioner and in favor of AA. The Court subsequently denied Petitioner's Petition for Panel Rehearing, in which she asked the Court to remand the case to the District Court for the purpose of allowing that court to consider whether Petitioner should be granted leave to amend her complaint

so as to request from that court an order compelling AA to submit to arbitration.

The actions of the Court of Appeals in this case thus deprived Petitioner of the opportunity to ask the District Court for the only relief which, according to the Court of Appeals, was available to Petitioner: an order compelling AA to arbitrate.

Petitioner recognizes that, in certain cases, various circumstances and factors will preclude a litigant from amending his or her pleadings. "Of course, the grant or denial of an opportunity to amend is within the discretion of the District Court." *Foman*, 371 U.S. at 182. This Court has identified certain circumstances under which a lower court should not permit an amendment, including "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [and] futility of amendment." *Id.*

Petitioner also recognizes the principle that the burden on the proponent of an amendment to show good cause for the amendment increases as time passes and the litigation progresses. *See, e.g., Dartmouth Review v. Dartmouth College*, 889 F.2d 13, 22-23 (1st Cir. 1989) (refusing to allow leave to amend in the case before it but noting that leave to amend, even after appeal, may be appropriate if "some new concept has surfaced, making workable an action previously in the doldrums"), *overruled on other grounds, Educadores Puertorriqueños en Accion v. Hernandez*, 367 F.3d 61 (1st Cir. 2004).

Nor does Petitioner quarrel with the general proposition that the lower courts should have discretion to decide

whether to allow amendment of pleadings after an appeal. Not surprisingly, however, in situations somewhat analogous to the case at bar, the lower courts have reached varying results when a plaintiff seeks leave to amend the complaint. *See, generally,* Annot., 4 A.L.R.Fed. 123 at §§ 19.6, 21; 6 C. Wright, A. Miller & M. Kane, Federal Practice and Procedure § 1488 at n.12; *id.* at § 1489. In *Negrich v. Hohn*, 379 F.2d 213 (3rd Cir. 1967), for example, a prisoner-plaintiff brought a civil rights action against six defendants. The district court granted all defendants' motions to dismiss. *Negrich*, 379 F.2d at 214. Plaintiff appealed, and the Court of Appeals affirmed. *Id.* at 215-16. The Court stated, however, "Since the order dismissing the complaint against [three of the defendants] is affirmed for reasons other than those given by the district court, this court does not preclude the district court, within its discretion, from permitting the plaintiff to file an amended complaint against" those defendants. *Id.* at 216. *See also Werner v. Werner*, 267 F.3d 288, 296-97 (3rd Cir. 2001) (securities fraud plaintiffs did not state claim but cause remanded and plaintiffs allowed to amend complaint to incorporate facts consistent with newly-discovered evidence); *In re Delagrange*, 820 F.2d 229 (7th Cir. 1987) (on remand after trial, appeal and reversal, party amended pleading to assert different statutory basis for recovery; Court of Appeals upheld trial court's decision to allow amendment of pleading); *Pross v. Katz*, 784 F.2d 455, 459-60 (2nd Cir. 1986) (fraud complaint did not state claim but cause remanded to allow plaintiff to cure pleading defect by amendment of complaint); *International Ladies' Garment Workers' Union v. Donnelly Garment Co.*, 119 F.2d 892, *modified*, 121 F.2d 561 (8th Cir. 1941) (labor union filed suit under antitrust law, went to trial and won; cause reversed on appeal on grounds of lack of federal question

jurisdiction but cause remanded to allow plaintiffs to amend their complaint to show jurisdiction based on diversity of citizenship). *But see Troxel Manufacturing Co. v. Schwinn Bicycle Co.*, 489 F.2d 968 (6th Cir. 1973), *cert. denied*, 416 U.S. 939 (1974) (affirming district court's refusal on remand to allow plaintiff to amend its complaint to set forth an alternative theory of recovery after summary judgment in favor of plaintiff on first theory had been reversed by Court of Appeals).

What makes this case one which this Court should hear is the fact that the Court of Appeals declared that Petitioner should have sought a particular remedy when, up to that point, the ability of Petitioner to pursue such a remedy was unclear and uncertain. Specifically, it was unclear whether an individual employee could bring an action to compel the employer to arbitrate under a collective bargaining agreement, or whether only the employee's union could do so. "Railroad workers have standing individually to pursue claims before the National Railroad Adjustment Board. . . . Whether airline employees also have a right to pursue claims individually is less clear." *Pyles v. United Air Lines, Inc.*, 79 F.3d 1046, 1052 n.9 (11th Cir. 1996). *See also Capraro v. United Postal Service Co.*, 993 F.2d 328, 337 (3rd Cir. 1993) (individual employee can seek order compelling arbitration). Indeed, less than a year before the Court of Appeals opinion in the case at bar (suggesting that Petitioner's sole remedy would be to seek an order compelling arbitration), a different panel of the same court held that the Railway Labor Act does *not* provide "airline employees with a statutory right to pursue arbitration individually before an airline's system's board of adjustment." *Martin v. American Airlines, Inc.*, 390 F.3d 601, 608-09 (8th Cir. 2004).

Petitioner acknowledges that lower courts must retain discretion as to when to allow a party to amend its pleading. Nevertheless, there are times when it is useful and appropriate for this Court to assist the lower courts by setting forth guidelines for the exercise of that discretion. *Cf. Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 124 S.Ct. 2466, 2482 n.15 (2004); *Douglas Oil Company of California v. Petrol Stops Northwest*, 441 U.S. 211, 228 (1979) (while district courts have discretion to determine proper response to request for disclosure of grand jury materials, this Court has "a duty . . . to guide the exercise of discretion"). Petitioner respectfully suggests that this case represents such an instance.

This Court should grant a writ of certiorari in this case to determine and hear the important question as to whether a Court of Appeals should allow a plaintiff to amend her complaint when (a) the Court of Appeals declares that the plaintiff sought the wrong remedy, but (b) the plaintiff's entitlement to the "correct" remedy was unclear and uncertain.

CONCLUSION

The Petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 11, 2005

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 04-1405
No. 04-1757

Susan Smith, Plaintiff-Appellant, v. American Airlines, Inc.; TWA Airlines, LLC; Airline Pilots Association Int'l, Defendants-Appellees.	*	Appeals from the United States District Court for the Eastern District of Missouri.

Submitted: January 11, 2005
Filed: July 18, 2005

Before LOKEN, Chief Judge, MORRIS SHEPPARD ARNOLD and MURPHY, Circuit Judges.

LOKEN, Chief Judge.

After American Airlines (AA) purchased the assets of bankrupt Trans World Airlines, Inc. (TWA), AA refused to hire Susan Smith, a former TWA pilot. The Air Line Pilots Association (ALPA) filed separate grievances on Smith's behalf against TWA and AA. ALPA settled the TWA grievance with TWA's bankruptcy estate. When AA rejected Smith's separate grievance against AA, Smith commenced

this action against AA[1] and ALPA. The district court[2] granted summary judgment in favor of defendants on all claims. Smith appeals the dismissal of her Railway Labor Act (RLA) claims, arguing that the transition collective bargaining agreement gave her a right to post-acquisition employment with AA, and that she may litigate this claim in federal court because (i) AA repudiated the exclusive grievance/arbitration remedies in the collective bargaining agreement, and (ii) ALPA breached its duty of fair representation by not vigorously pursuing her rights in the grievance process. Reviewing the district court's grant of summary judgment *de novo*, we affirm.

I. Background.

In 1998, while employed by TWA, Smith received an offer of employment from AA and secretly enrolled in its pilot training program. Smith took the AA pilot training during a personal leave of absence from TWA. Both airlines then considered her an employee. Some weeks later, AA discharged Smith, primarily because she failed to successfully complete the training program. Smith returned to her duties as a TWA pilot when her personal leave ended.[3]

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[1] AA established a wholly owned subsidiary, Trans World Airlines LLC, to operate TWA's assets during the post-acquisition transition period. Both AA and its subsidiary are co-defendants in this action. For convenience, we refer to the actions of the subsidiary as though they were actions of AA.

[2] The HONORABLE HENRY E. AUTREY, United States District Judge for the Eastern District of Missouri.

[3] Smith's simultaneous employment with AA and TWA violated both airlines' policies. Smith admits TWA would likely have fired her had she disclosed this fact.

The 2001 Asset Purchase Agreement between AA and TWA provided that AA would offer post-acquisition employment to "all of [TWA's] U.S.-based union employees (*other than personnel who (A) have previously been terminated by [AA]* . . . or (B) would not be qualified for employment under [AA's] general hiring policies as in effect at Closing)" (emphasis added). That provision was inconsistent with ALPA's existing collective bargaining agreement with TWA, which provided that any successor of TWA must "employ the pilots on the TWA Pilots System Seniority List." But threatened with possible bankruptcy court repudiation of the entire bargaining agreement, ALPA agreed to modify this aspect of the existing agreement and, after the closing, to enter into a transition collective bargaining agreement with AA. According to Smith's view of the relevant documents, the transition agreement incorporated by reference a pre-closing letter from AA to ALPA stating: "It is [AA's] intention that all of TWA's U.S. based represented employees who meet the qualifications described in the Asset Purchase Agreement become [AA] employees as quickly as possible."

After the closing, AA hired TWA pilots it considered eligible under the Asset Purchase Agreement provision but advised that Smith and six others were ineligible because they were previously terminated by AA or an AA affiliate. ALPA filed grievances on behalf of the seven pilots. In the months following the asset purchase, the grievances ALPA filed with TWA for wrongful discharge became claims for administrative expenses in TWA's bankruptcy proceedings. AA refused to proceed with the separate grievances ALPA filed under the transition collective bargaining agreement on the ground that the ineligible pilots were not AA employees covered by that agreement. However, AA

notified the ineligible pilots that they could appeal its hiring decisions by submitting "documentation they feel is appropriate to support their request for review." In addition, ALPA officials sought meetings for the seven pilots and informally attempted to plead their cases. Four submitted documentation and argued that their prior separations should not be characterized as terminations. AA agreed and hired them. AA later offered to meet informally with the other three. Smith submitted no documentation supporting her claim that she had resigned from AA in 1998, and she declined AA's offer to discuss her case informally. She was not hired. This lawsuit followed.

II. The RLA Claims.

Smith argues that AA breached the transition collective bargaining agreement by failing to hire her after purchasing TWA's assets and by refusing to process her grievance under that agreement. AA denies that it was contractually bound to hire Smith. Moreover, AA contends that Smith has no claim under the RLA because she was not an AA employee within the meaning of either the RLA, *see* 45 U.S.C. § 151, Fifth, or the transition bargaining agreement. The district court agreed.

Whether Smith was an employee within the meaning of the RLA is an aspect of the merits of her claim. That claim is, in the language of the Act, a "minor dispute" – a controversy "over the meaning of an existing collective bargaining agreement in a particular fact situation." *Bhd. of R.R. Trainmen v. Chicago R. & I.R. Co.*, 353 U.S. 30, 33 (1957). This is a federal claim that "must be resolved only through the RLA mechanisms, including the carrier's internal dispute-resolution processes and an adjustment

board established by the employer and the unions." *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 253 (1994). Under the RLA, minor disputes are subject to mandatory arbitration before an adjustment board which has primary jurisdiction to construe the collective bargaining agreement. The aggrieved employee "may not resort to the courts in the first instance." *Penn. R.R. v. Day*, 360 U.S. 548, 552 (1959).[4] However, the Supreme Court has recognized exceptions to this rule, situations "in which the employee should not be limited to the exclusive remedial procedures established by the contract." *Vaca v. Sipes*, 386 U.S. 171, 185 (1967). Smith argues that two of those exceptions are applicable here.

1. Emphasizing on appeal an issue that was preserved but not argued in the district court, Smith argues that she may litigate her RLA breach of contract claim in federal court, without exhausting the adjustment board remedy provided by the transition collective bargaining agreement, because AA's refusal to process her grievance under that agreement "amounts to a repudiation of those contractual procedures." *Vaca*, 386 U.S. at 185. We disagree.

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[4] Technically, when the employee asserts a state law breach of contract claim, the claim is preempted by the RLA if it depends on an interpretation of the collective bargaining agreement. *See McCormick v. Aircraft Mechanics Fraternal Ass'n*, 340 F.3d 642, 644 (8th Cir. 2003). On the other hand, when the employee asserts a *federal* claim under the RLA for breach of the collective bargaining agreement, as Smith does in this case, the question is not preemption but whether the claim is barred by the failure to exhaust the contractual adjustment board remedy as construed by the Supreme Court. *See Andrews v. Louisville & N.R.R.*, 406 U.S. 320, 325 (1972).

When AA declared seven pilots ineligible for post-acquisition hire because of prior terminations, Smith and the others argued they had a contractual *right* to become covered employees, and ALPA filed grievances on their behalf. The transition agreement provided grievance procedures for "pilots covered by this Agreement." AA took the position that these contractual procedures did not apply because Smith and the others were not hired and therefore were not employees "covered by" the agreement. Instead, AA offered an informal procedure whereby the seven could seek review of its initial decisions. Four of the seven did so and were hired; Smith refused AA's offer of an informal meeting. The transition agreement further provided that the RLA-mandated adjustment board "shall have jurisdiction over disputes between any employee covered by this Agreement and the Company, growing out of . . . interpretation or application of any of the terms of this Agreement." AA took the position that the adjustment board lacked jurisdiction over this dispute, again because Smith was not a covered employee.[5]

The result of this impasse was a classic dispute over "arbitrability," that is, the question whether AA and ALPA agreed in the transition agreement to submit this type of disagreement to the adjustment board. The way to resolve such disputes is by a suit to compel arbitration. *See generally First Options of Chicago, Inc. v. Kaplan*, 514 U.S.

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[5] Though applicants for employment are not "employees" under the RLA if the collective bargaining agreement leaves hiring decisions to the employer's discretion, a dispute over whether the relevant collective bargaining agreement gives employees of the selling carrier a right to priority in the buyer's post-acquisition hiring may well be an issue that must be submitted to the adjustment board. *See Pyles v. United Air Lines, Inc.*, 79 F.3d 1046, 1051-52 (11th Cir. 1996).

938 (1995). In RLA cases, arbitrability determines the adjustment board's jurisdiction and is therefore a question for the court. But "in deciding whether the parties have agreed to submit a particular grievance to arbitration, a court is not to rule on the potential merits of the underlying claims." *AT&T Tech., Inc. v. Communications Workers of Amer.*, 475 U.S. 643, 649 (1986).

Viewed in this light, it is apparent that AA did not "repudiate" the grievance and arbitration procedures in the transition collective bargaining agreement. It simply took the position that they did not apply to this dispute. ALPA could have presented the question of arbitrability by suing to compel AA to submit the dispute to the adjustment board. But ALPA did not do, and Smith does not contend this was a breach of the union's duty of fair representation. Nor does Smith seek to compel arbitration in this lawsuit. Instead, she asks the federal court to litigate the merits of her claim, contrary to the strong federal policy that RLA minor disputes should be arbitrated, not litigated. Where all an employee shows is the need for judicial help in compelling arbitration, the repudiation exception does not apply. A federal court may compel arbitration at the employee's (or the union's) request, but it may not intrude upon the adjustment board's authority by deciding the merits of the collective bargaining agreement dispute. *See Capraro v. United Parcel Serv. Co.*, 993 F.2d 328, 336-37 (3d Cir. 1993); *accord Pyles*, 79 F.3d at 1052.

2. Alternatively, Smith renews on appeal her primary RLA argument to the district court – that she may bring her breach of contract claim to federal court without exhausting the mandatory arbitration remedy under the recognized exception for "hybrid" claims "that allege both a

breach of the collective bargaining agreement by the employer and a breach of the duty of fair representation by the union." *McCormick*, 340 F.3d at 645. The duty of fair representation is breached "when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." *Vaca*, 386 U.S. at 190. Smith alleges that ALPA breached its duty by more aggressively pursuing the claims of the six other ineligible pilots during the informal review process conducted by AA.

Some circuits have limited this exception to cases where the union's breach of duty caused the employee to lose her right to press a grievance before the arbitration board. *See Miklavic v. USAir Inc.*, 21 F.3d 551, 557 (3d Cir. 1994), and cases cited. This limitation is consistent with the purpose behind the exception, *see Vaca*, 386 U.S. at 185, and thus has much to commend it. Smith does not fall within the exception so limited because (i) ALPA submitted her grievance to the adjustment board, (ii) Smith does not claim that ALPA breached its duty by failing to bring an action to compel arbitration, and (iii) Smith failed to show that ALPA's action prevented her from pressing her own grievance by suing to compel arbitration.

The district court did not consider this limitation, concluding instead that "the record establishes that none of the actions taken by ALPA were arbitrary, discriminatory or in bad faith." We agree. ALPA filed grievances on behalf of the ineligible pilots and then assisted them in pursuing relief through AA's informal review process. Four pilots presented satisfactory evidence explaining their prior separations and were hired. Smith refused to meet with AA and acknowledged she knew of no document establishing that she was not terminated by AA. "A union does not act arbitrarily simply because it does not pursue

a grievance that it has decided lacks merit." *Schmidt v. IBEW, Local 949*, 980 F.2d 1167, 1170 (8th Cir. 1992) (quotation omitted). In these circumstances, even if true, ALPA's alleged decision to assist more aggressively the ineligible pilots who had stronger claims for relief under the transition collective bargaining agreement than Smith does not come close to establishing a breach of the union's duty of fair representation.

For the foregoing reasons, we conclude that Smith's RLA claims against both AA and ALPA were properly dismissed.

III. A Taxation of Costs Issue.

After the district court granted summary judgment dismissing Smith's claims, defendants filed bills of costs. Smith failed to object, and the clerk taxed the costs claimed. One month later, Smith moved to reconsider, arguing that many of the taxed costs were improper. The district court denied this motion, noting that Smith did not "set forth any authority under the applicable rules . . . for the Court to reconsider the taxation of costs," and that "the costs which were taxed are in accordance with 28 U.S.C. § 1920." On appeal, Smith urges us to treat her motion to reconsider as a motion for relief under Rule 60(b)(1). So construed, she argues that its denial was an abuse of discretion because she terminated her trial counsel before receiving the bills of costs and should therefore be relieved from complying with the local rule requiring the filing of objections within fourteen days.

Rule 60(b)(1) authorizes the district court to grant relief from an order based upon a showing of "mistake, inadvertence, surprise, or excusable neglect." In this case,

Smith made no such showing to the district court. Indeed, she did not argue excusable neglect nor even cite Rule 60(b)(1). Thus, the court did not abuse its discretion in failing to grant Rule 60(b) relief. Moreover, even if Smith had raised the issue of excusable neglect in the district court, the local rule requiring objections to the bills of costs within fourteen days was clear, and therefore her failure to comply "will not constitute excusable neglect under Rule 60(b)." *Bennett v. Dr. Pepper/Seven Up, Inc.*, 295 F.3d 805, 808 (8th Cir. 2002).

The judgment of the district court is affirmed.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

SUSAN SMITH,	)	
	)	
Plaintiff,	)	
	)	Case No.
vs.	)	4:01CV1565 HEA
	)	
AMERICAN AIRLINES, et al.,	)	
	)	
Defendants.	)	

MEMORANDUM AND ORDER

This matter is before the Court on defendant Air Line Pilots Association's (ALPA) Motion for Summary Judgment, [#99] and defendants American Airlines Inc. and TWA LLC's Motion for Summary Judgment, [#100]. For the reasons set forth below, the Motions are granted.

Facts and Background

Plaintiff brought this action alleging that she was not offered employment with TWA LLC, a subsidiary of American, in April 2001 when American acquired the assets of TWA under an asset purchase agreement which was approved by the Delaware Bankruptcy Court and agreed to by plaintiff's union. Plaintiff claims she was denied employment based on her previous employment termination by American as a result of her failure to successfully complete American's flight engineer training program in 1998. Plaintiff claims that the decision not to hire her in 2001 violates the Railway Labor Act (RLA), and Title VII because her termination in 1998 from American was gender based; that she was treated disparately in 2001; or because the 2001 decision was retaliatory

for having allegedly made complaints in 1998. Plaintiff also alleges that defendants' actions violate the Texas Commission on Human Rights Act. Plaintiff further asserts that ALPA failed to negotiate in an effort to prevent the exclusion of any of its active pilots as American Airlines moved forward with the acquisition of the assets of TWA, Inc. and that ALPA failed to prosecute and process grievances on behalf of plaintiff to regain her employment as an active pilot in violation of the RLA, Title VII and the Texas Commission on Human Rights Act.[1]

Plaintiff became a flight engineer at TWA, Inc. in 1998. Later that year, she accepted a position as a pilot for American Airlines. She took a leave of absence from TWA to train at American. Plaintiff failed the training at American and was terminated in December, 1998. Plaintiff then returned to TWA, Inc., where she remained employed until April, 2001.

In April 2001, American purchased most of the assets of TWA, Inc. TWA Airlines, LLC was established as a subsidiary of American to operate TWA, Inc.'s assets. Most of the TWA, Inc. pilots were offered employment with TWA, LLC, but, alas, plaintiff was not.

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[1] Count I is brought against all defendants for the alleged violation of the RLA; Count II is brought against all defendants for the alleged violation of Title VI, gender discrimination; Count III brought against all defendants for the alleged violation of Title VII, retaliation; Count IV brought against all defendants for the alleged violation of the Texas Commission on Human Rights Act, gender discrimination; and Count V brought against all defendants for the alleged violation of the Texas Commission on Human Rights Act, retaliation.

The terms of American's offer to purchase TWA Inc.'s assets were stated in an Asset Purchase Agreement. As part of the Agreement, American agreed to hire TWA, Inc.'s unionized employees, with certain specific exceptions. One of the exceptions stated that American would not offer employment to any TWA, Inc. employees who had been previously terminated by American or one of its affiliates.

The collective bargaining agreement between ALPA and TWA, Inc. contained a provision that required TWA, Inc. to insist that any purchaser of TWA, Inc.'s assets employ all of TWA, Inc.'s pilots. Under the terms of the Asset Purchase Agreement, TWA, Inc. was required to eliminate that provision. The TWA Master Executive Council (the Council), which was the governing body for ALPA at TWA, Inc., insisted that all TWA, Inc. pilots obtain employment.

TWA, Inc. filed a motion in its Bankruptcy proceedings to reject its collective bargaining agreement with ALPA in its entirety. The Council thereafter determined to agree to eliminate TWA, Inc.'s required provisions from the Collective Bargaining Agreement, rather than having the Bankruptcy Court grant the motion to reject the entire Collective Bargaining Agreement.

The Bankruptcy Court approved the Asset Purchase Agreement. In its Order approving the Agreement, the Bankruptcy Court specifically held that

> [t]he sale of the Transferred Assets to Purchaser *shall be free and clear of Liens* (other than Liens created by Purchaser) pursuant to section 363(f) of the Bankruptcy Code whatsoever known or unknown including, but not limited to, any of the

> Sellers' creditors, vendors, suppliers, *employees*, or lessors and that Purchaser shall not be liable in any way (as successor entity or otherwise) for any claims that any of the foregoing or any other third party may have against any of the Sellers, provided further that, with regard to employees' claims, the free and clear delivery of the Assets shall include, but not be limited to, all asserted or unasserted, known or unknown, employment related claims, payroll taxes, employee contracts, employee seniority accrued while employed with any of the Sellers and successorship liability, with any and all valid and enforceable Liens thereon, including those asserted by Seller's secured lenders, to be transferred, affixed, and attached to the net proceeds of such sale, with the same validity, priority, force, and effect as such Liens had upon the Transferred Assets immediately prior to the Closing.

Order *Pursuant to Sections 105(a), 363, 365, and 1146© of the Bankruptcy Code (i) Authorizing the Debtors' Sale of Substantially All of Their Assets Free and Clear of Liens, Claims, and Encumbrances; (ii) Approving an Asset Purchase Agreement; and (iii) Approving the Assumption and Assignment of Certain Executory Contracts and Unexpired Leases in Connection with Such Sale*, Exhibit C-4, paragraph 4, page 5 to Defendant American Airline and TWA LLC's Memorandum in Support of their Motion for Summary Judgment. (Emphasis added).

On April 3, 2001, ALPA representatives heard rumors of the existence of a list of 51 TWA, Inc. employees who would be ineligible for employment at TWA LLC under the terms of the Asset Purchase Agreement. ALPA received a list of seven pilots, including plaintiff, whom American had deemed ineligible for employment at TWA LLC.

On April 4, 2001, TWA, Inc. sent a letter to each of these pilots advising them that their employment with TWA, Inc. would be terminated on the date the asset sale to American closed, at which time TWA, Inc. would cease operations. On April 5, 2001, ALPA filed two grievances against TWA, Inc. on behalf of these seven pilots challenging their termination as being without just cause and without the required procedures. On April 9, 2001, ALPA filed an additional grievance against TWA, Inc. asserting that the termination of these seven pilots also violated seniority provisions of the collective bargaining agreement. TWA, Inc. ceased operations when the transaction with American became effective on April 10, 2001. ALPA continued to pursue the grievances as a bankruptcy claim. This claim was settled by ALPA for $105,000 from the Bankruptcy Estate. Plaintiff received $11,728.45 from this settlement.

A representative from ALPA and plaintiff's Chief Pilot left separate messages for plaintiff to advise her that she would not be hired by TWA LLC on April 4, 2001. On April 6, 2001, a former employee of TWA, Inc. sent a package to each of the seven pilots containing a notice of a process by which they could request a review of American's decision not to offer them employment at TWA LLC.

Members of the Council, the ALPA's Grievance Committee and its Representation Department staff made themselves available to the seven pilots upon learning of the review process. Four of the seven were ultimately determined to have been separated from American, but not terminated.

The ALPA filed grievances on behalf of the three remaining pilots. When no response was received, ALPA

filed additional grievances protesting TWA LLC's failure to respond. TWA LLC took the position that it would not process grievances related to its offers of employment to TWA, Inc. pilots. The ALPA unsuccessfully tried to convince TWA LLC to submit those claims to the arbitration panel established by the ALPA-TWA LLC collective bargaining agreement. The ALPA filed a grievance challenging the omission of plaintiff's and others from the TWA LLC pilot seniority list. When TWA LLC refused to process that grievance, ALPA challenged the refusal through another grievance. Additionally, ALPA's attorney requested that ALPA's legal department review the grievance filed to determine whether there was a basis for a suit to compel TWA LLC to process the grievances. ALPA continued to submit all of the grievances to the arbitration panel. TWA LLC refused to cooperate.

Informal efforts, such as letters to various American and TWA LLC officials, were also conducted on behalf of the remaining pilots that were not hired.

On November 6, 2001, American invited plaintiff to schedule an interview to discuss her case. Plaintiff declined the invitation.

On March 5, 2002, the National Mediation Board determined that the operations of American and TWA LLC were sufficiently integrated that the pilots for both should be represented by a single union. On April 3, 2002, the Board determined that the Allied Pilots Association (APA, the union for American pilots) would be the representative. ALPA's right to represent the pilots of TWA LLC were thereby extinguished. ALPA officials met with APA representatives to discuss and transfer files on all open TWA LLC grievances, including those involving

plaintiff. None of the remaining three TWA Inc. pilots has been offered employment with TWA LLC.

Plaintiff has not been offered employment with TWA LLC. She was advised that she was not eligible for employment because she had been previously terminated by American Airlines.

Discussion

Summary Judgment Standards

The standards for summary judgment are well settled. In determining whether summary judgment should issue, the Court views the facts and inferences from the facts in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Employers Mut. Cas. Co. v. Wendland & Utz*, Ltd, 2003 WL 22956934 (8th Cir. March 14, 2003); *Enter. Bank v. Magna Bank*, 92 F.3d 743, 747 (8th Cir. 1996). The moving party has the burden to establish both the absence of a genuine issue of material fact and that it is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Enter. Bank*, 92 F.3d at 747. Once the moving party has met this burden, the nonmoving party may not rest on the allegations in its pleadings but by affidavit or other evidence must set forth specific facts showing that a genuine issue of material fact exists. Fed.R.Civ.P. 56(c); *Anderson*, 477 U.S. at 256; *Krenik v. Le Sueur*, 47 F.3d 953, 957 (8th Cir. 1995). "[A] complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial."

Celotex, 477 U.S. at 323. With these standards in mind, the Court will review the facts in this case.

American and TWA LLC

Railway Labor Act

Count I of plaintiff's Second Amended Complaint is brought under the provisions of the Railway Labor Act, 45 U.S.C. § 151 *et seq.* (the RLA). Plaintiff claims that American and TWA LLC violated the RLA in failing to offer her employment in that there was agreement between American and TWA, Inc. to offer employment, with certain exceptions, to all of TWA's union employees. Further, plaintiff claims that these defendants violated the collective bargaining agreement between ALPA and TWA, Inc. which required any successor or transferee of the assets of TWA Inc. to unconditionally guarantee that TWA, Inc. pilots be employed by said successor or transferee. Plaintiff alleges that the failure to offer her employment with TWA LLC was unjustified, without just cause and done without a thorough, impartial and expeditious investigation and was in violation of her rights accorded by the agreements. Plaintiff further contends that American and TWA LLC conspired with her union to violate her rights under the RLA by denying her employment and by failing to process grievances on her behalf.

The facts before the Court establish that plaintiff was not an employee and therefore she has no rights under the RLA. The RLA defines "employee" as *"every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee."* (Emphasis added) 45 U.S.C. § 151, Fifth. Because plaintiff

was not in the service of either American or TWA LLC and not subject to either's supervision, she does not fall within the RLA's definition of "employee." Plaintiff's argument in opposition boldly attempts to establish successor liability on TWA LLC's part under the Bankruptcy Court's order regarding successor liability. As American and TWA LLC correctly observe, the Bankruptcy Court specifically exempts these defendants from any successor liability with regard to any employee claims at the time of the Purchase Agreement. See *EEOC v. Knox-Schillinger (In re TWA)*, 322 F.3d 283, 286-87 (3d Cir. 2002). Because there is no successor liability by reason of the Bankruptcy Court Order, plaintiff can in no way be categorized as an employee and therefore she has no claim under the RLA.

Title VII and the Texas Commission on Human Rights Act

Counts II and IV of the Second Amended Complaint allege gender discrimination claims under Title VII and the Texas Commission on Human Rights Act, respectively. As defendants correctly point out, and plaintiff does not dispute, the analysis under both statutes is the same. See *M.D. Anderson Hospital v. Willrich*, 28 S.W.3d 22, 24 (Tex 2000); *NME Hospitals, Inc. v. Rennels*, 994 S.W.2d 142, 144 (Tex. 1999); *Gold v. Exxon Corp.*, 960 S.W.2d 378, 380-81 (Tex.Civ.App. 1998).

Because plaintiff has not presented any direct evidence of gender discrimination, indirect evidence must be established under the three step formula articulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Under this formula, plaintiff must first present a *prima facie* case of intentional discrimination. The burden then

shifts to defendant to articulate a legitimate, nondiscriminatory reason for its action. If defendant meets that minimal burden, plaintiff must show that the proffered nondiscriminatory reason is merely a pretext for unlawful gender discrimination. *Id.* at 802-04. Plaintiff has failed to present a *prima facie* case of intentional gender discrimination.

To establish a *prima facie* case of gender discrimination, plaintiff must show (i) that she belongs to a protected class; (ii) that she was qualified for the position; (iii) that she was not hired because of her sex. *Id.*, at 804. Plaintiff cannot establish either that she was qualified for the position nor that she was not hired because of her sex.

Plaintiff was not hired because she was previously terminated by American Airlines. Thus, she was not qualified, under the Asset Purchase Agreement for the position. While plaintiff argues that other male pilots received employment and she did not, the record is clear that she was not similarly situated in all respect [sic] with those pilots. *Ottman v. City of Independence, MO*, 341 F.3d 751, 757 (8th Cir. 2003); *Putman v. Unity Health System*, 348 F.3d 732, 736 (8th Cir. 2003). Of the seven pilots originally denied employment, five were subsequently hired after investigation revealed that their circumstances were not terminations of employment, rather the separations were classified as voluntary resignations or the employees were categorized as eligible for rehire in positions other than pilots. The record is devoid of any evidence or suggestion that plaintiff's termination was not just that, despite her efforts to characterize her termination as a resignation or any other type of separation from American Airlines. Likewise, plaintiff fails to establish

that the other two male pilots who did not receive offers of employment were treated more favorably than she.

Furthermore, even assuming, *arguendo*, that plaintiff could establish her *prima facie* case, defendants have articulated a valid nondiscriminatory reason for not hiring plaintiff, *i.e.* that she was previously terminated by American and therefore did not meet the agreed upon terms of the Asset Purchase Agreement, which were approved by the Bankruptcy Court. Defendants' neutral no-rehire after termination position is a "quintessential legitimate, nondiscriminatory reason fro [sic] refusing to rehire an employee who was terminated" by American Airlines. *Raytheon v. Hernandez*, ___ U.S. ___, 2003 WL 22843597 (U.S. December 2, 2003) at *6.

Plaintiff's claims of retaliation, Counts III and V, are likewise analyzed under the *McDonnell Douglas* framework. *EEOC v. Kohler*, 335 F.3d 766, 772 (8th Cir. 2003). Plaintiff must establish a *prima facie* case of retaliation by demonstrating that: (1) she engaged in protected activity; (2) she suffered an adverse employment action; and (3) there was a causal connection between the adverse employment action and the protected activity. *Id.* Because of the nondiscriminatory, legitimate gender neutral reason for not hiring plaintiff, she cannot establish any retaliatory action based on her claims of gender discrimination.

Furthermore, the record is evanescently clear that plaintiff was informed originally in April, 2001 that she was not going to be hired by TWA LLC. Further, she was informed in early May, 2001 that her review was denied that she remained ineligible for employment. Plaintiff filed her charges of discrimination *after* this action, *ergo*, the

decision to not offer her employment can in no way be based on her charges of gender discrimination.

Because of the failure to present a *prima facie* case of gender discrimination or of retaliation, these defendants are entitled to summary judgment on Counts II, III, IV, and V.

ALPA

RLA Claims

Plaintiff bases her RLA claims in Count I on the position that the ALPA violated the duty of fair representation "[b]y its failure to engage in the appropriate grievance procedure. In order to establish that the union breached its duty, plaintiff mush [sic] show that the union's actions are so egregious that they cannot be justified, *Burford v. Runyon*, 160 F.3d 1199, 1203 (8th Cir. 1998), because they are "arbitrary" such that they are "wholly 'irrational'" *Air Line Pilots Ass'n, Int'l v. O'Neill*, 499 U.S. 65, 78 (1991); discriminatory; or in bad faith. *Amalgumated Ass'n of St. Elec. Ry & Motor Coach Employees v. Lockridge*, 403 U.S. 274, 301 (1971).

In the instant case, ALPA filed and processed seven grievances on plaintiff's behalf. As a result of these grievances, plaintiff received, a portion of the Bankruptcy Estate of TWA. Further, representatives from ALPA formally and informally pursued plaintiff's cause. Numerous letters were written on her behalf; all information was sent to plaintiff and she was advised of the review process that was available. All available avenues were pursued. It appears that plaintiff, on the other hand, was not as interested in pursuing available avenues when presented with them; plaintiff refused the invitation to discuss her

situation with American when provided. The record established that none of the actions taken by ALPA were arbitrary, discriminatory or in bad faith. The fact that the hiring decisions were left to American and TWA LLC does not establish a clause of action against the ALPA for a breach of the duty of fair representation.

Title VII and Texas Commission on Human Rights Act

Plaintiff seeks recovery from all defendants for alleged violations of Title VII and the Texas Commission on Human Rights Act by discriminating against her based on her gender and in retaliation for filing discrimination charges. However, in her Second Amended Complaint plaintiff only challenges ALPA for assisting pilots in their efforts to be employed by "TWA"/"American" but not assisting plaintiff and thus she was treated less favorably than similarly situated males.

Title VII[2] prohibits a labor union from excluding or expelling from its membership, or otherwise discriminating against, any individual because of his race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2(c)(1). Further, a labor union may not discriminate against any member because of charges of discrimination. 42 U.S.C. § 2000c-3(a).

Plaintiff contends that ALPA did nothing to help her obtain employment with TWA LLC. The record is explosively replete with evidence of the substantial efforts ALPA undertook on plaintiff's behalf: Multiple grievances

[2] See discussion, *supra* regarding the Court's analysis of Title VII and the Texas statutes.

were filed; letters and e-mails were written and sent; any and all information was passed on to plaintiff regarding the actions taken and the actions she could take; requesting individual meetings. The record clearly belies plaintiff's claim.

Furthermore, plaintiff again fails to establish a *prima facie* case with respect to ALPA because she cannot show that she was qualified for the position or that similarly situated males were treated differently. Plaintiff was included in every effort made by ALPA on behalf of the seven pilots who were originally denied employment. The ultimate decisive factor was and remains that those pilots, male and female, who had been previously *terminated* by American were not offered employment with TWA LLC and the fact that plaintiff is female is of no consequence in relation to the decision. The nondiscriminatory, gender neutral decision precluded ALPA from accomplishing the goal of its substantial efforts on plaintiff's behalf.

Based on the record, ALPA is entitled to summary judgment on plaintiff's discrimination and retaliation claims.

Conclusion

Based upon the foregoing analysis, plaintiff has failed to establish any genuine issues as to any material facts. Defendants are therefore entitled to judgment as a matter of law under the provisions of Rule 56 of the Federal Rules of Civil Procedure.

Accordingly,

IT IS HEREBY ORDERED that Air Line Pilots Association's Motion for Summary Judgment, [#99], is granted.

IT IS FURTHER ORDERED that defendants American Airlines, Inc and TWA Airlines LLC's Motion for Summary Judgment, [#100] is granted.

A separate judgment in accordance with this Memorandum and Order is entered this same date.

Dated this 8th day of January, 2004.

/s/ Henry Edward Autrey
HENRY EDWARD AUTREY
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

SUSAN SMITH, Plaintiff,	)	
vs.	)	Case No. 4:01CV1565 HEA
AMERICAN AIRLINES, et al., Defendants.	)	

JUDGMENT

In accordance with the Memorandum and Order entered this same date, summary judgment is granted in favor of defendants and against plaintiff.

Dated this 8th day of January, 2004.

/s/ Henry Edward Autrey
HENRY EDWARD AUTREY
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 04-1405/04-1757

Susan Smith, Appellant, v. American Airlines, Inc., et al., Appellees.	*	Appeal from the United States District Court for the Eastern District of Missouri

The petition for rehearing by the panel filed by appellant is denied.

(5193-010199)

August 15, 2005

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 04-1405
No. 04-1757

SUSAN SMITH,	) **Appeal from the United**
Appellant,	) **States District Court**
	) **Eastern District of Missouri**
vs.	) **No. 4:01-CV-1565 HEA**
AMERICAN AIRLINES, et al.,	)
Appellees.	)

APPELLANT'S PETITION FOR PANEL REHEARING

Appellant, Susan Smith, by and through her undersigned counsel, and pursuant to Rule 40 of the Federal Rules of Appellate Procedure, respectfully petitions this Court to grant a panel rehearing herein. Specifically, pursuant to Rule 40(a)(4)(A) of the Federal Rules of Appellant Procedure, Appellant respectfully suggests that this Court grant this petition and, without reargument, remand this case to the District Court to consider whether Appellant should be granted leave to amend her complaint so as to request the District Court to compel Appellees American Airlines, Inc., and TWA Airlines, LLC ("AA/TWA"), to submit to arbitration with respect to Appellant's claim that she is entitled to employment by

AA/TWA. Alternatively, Appellant suggests that this Court, with or without reargument as this Court may determine, remand this case to the District Court with directions to allow Appellant to so amend her complaint.

In support of this Petition, Appellant states as follows:

1. This case was submitted to the panel on January 11, 2005.

2. The panel opinion (the "Opinion") in this case was filed on July 18, 2005, and this Court entered its judgment herein on the same date.

3. Appellant brought this action against AA/TWA under the Railway Labor Act, 45 U.S.C. §§ 151 *et seq.* (the "Act"). Appellant claimed that AA/TWA's refusal to offer her employment after AA/TWA acquired the assets of bankrupt Trans World Airlines, Inc., violated the Act because a transition collective bargaining agreement entered into between AA/TWA and Appellant's union required AA/TWA to offer her employment.

4. The District Court concluded that Appellant could not maintain an action under the Act because she was never an "employee" of AA/TWA, as the Act defines that term. Accordingly, the District Court granted summary judgment in favor of AA/TWA and against Appellant on her claims under the Act.

5. Appellant appealed. This Court never reached the issue of whether Appellant qualified as an "employee" under the Act. This Court also never reached the issue of whether the transition collective bargaining agreement between AA/TWA and Appellant's union required AA/TWA to offer Appellant employment.

6. Instead, this Court held that Appellant could not litigate the merits of her claim against AA/TWA in the federal district court because Appellant had not exhausted her remedies under the Act. Specifically, this Court held that, under the Act, "minor disputes are subject to mandatory arbitration before an adjustment board which has primary jurisdiction to construe the collective bargaining agreement." Opinion at p. 4. *See also* 45 U.S.C. § 184 (requiring airlines and their unions to establish boards of adjustment to arbitrate disputes not resolved through the airlines' internal grievance procedures). Because the dispute between Appellant and AA/TWA had not been submitted to the System Board of Adjustment created pursuant to the transition collective bargaining agreement, Appellant, according to the Opinion, could not resort to the federal district court.

7. In this case Appellant, through her union, and before filing suit in the District Court, had attempted to resolve her dispute with AA/TWA through the company's grievance procedures. Appellant also, again through her union, attempted to submit the dispute to the System Board of Adjustment. AA/TWA, however, took the position that, because Appellant was not an AA/TWA employee, the grievance procedures were not available to her. AA/TWA similarly took the position that Appellant's dispute with AA/TWA was not subject to arbitration before the System Board of Adjustment. AA/TWA adamantly refused to submit to arbitration Appellant's claim that AA/TWA was obligated to offer her employment pursuant to the transition collective bargaining agreement.

8. Appellant then brought suit in the District Court. Appellant claimed that AA/TWA's refusal to submit to arbitration constituted a "repudiation" of the grievance

and arbitration procedures in the transition collective bargaining agreement. *See Vaca v. Spies*, 386 U.S. 171, 185 (1967). Appellant claimed that this "repudiation" entitled her, pursuant to an exception to the Act's exhaustion requirement, to litigate her claim in the District Court. *See id.*

9. This Court disagreed, holding that AA/TWA did not repudiate the grievance and arbitration procedures of the transition collective bargaining agreement simply by taking the position that those procedures did not apply to Appellant's dispute. *See* Opinion at p. 6. This Court suggested that Appellant should have sued to compel arbitration and noted that Appellant's suit filed in the District Court did not seek that relief. *Id.* Accordingly, this Court affirmed the judgment of the District Court. *See id.* at p. 8.

10. **In simply affirming the District Court (albeit on grounds different from those upon which the District Court had based its decision) without remanding the case to the District Court for further proceedings, this Court overlooked (a) the well-recognized principle, that the Railway Labor Act "reflects a strong congressional interest in seeing that employees are not left remediless," *Pyles v. United Air Lines, Inc.*, 79 F.3d 1046, 1052 (11th Cir. 1996) (citing *Capraro v. United Parcel Service Co.*, 993 F.2d 328, 336 (3d Cir. 1993)); and (b) the availability to the Court of a disposition that would allow Appellant to pursue the remedy which the panel in this case said that Appellant should have pursued, an action to compel arbitration. Specifically, this Court overlooked the remedy of allowing Appellant to amend her complaint so as to request that**

AA/TWA be compelled to arbitrate the dispute between Appellant and those Appellees.

11. The fact that Appellant had not previously sought directly a court order compelling arbitration does not preclude her, on remand, from amending her complaint to do so now. "An amendment can be proper after remand to the district court even if the claim was presented for the first time on appeal or had not been presented to the district court in a timely fashion." *City of Columbia, Missouri, v. Paul N. Howard Co.*, 707 F.2d 338, 341 (8th Cir.), *cert. denied*, 464 U.S. 893 (1983). In *City of Columbia*, this Court quoted the well-recognized provision of the Federal Rules of Civil Procedure that "[a] party may amend his pleading . . . by leave of court . . . ; and leave shall be freely given when justice so requires." *Id.* (quoting Fed.R.Civ.P. 15(a) (1966)). This Court noted that Rule 15(a) "encourages courts to look favorably on requests to amend "when justice so requires." *Id.* (quoting C. Wright and A. Miller, *Federal Practice and Procedure*, § 1484 at 417 (1971)). *See also Werner v. Werner*, 267 F.3d 288, 296-98 (2d Cir. 2001) (vacating dismissal of action and remanding to district court with directions to allow plaintiff to amend complaint based on newly-discovered evidence).

12. In the present case, justice requires, at a minimum, allowing Appellant to present to the District Court her arguments as to why she should be permitted to amend her complaint so as to seek an order compelling AA/TWA to arbitrate the dispute between those Appellees and Appellant. First, while Appellant did not directly ask the District Court to compel arbitration, the subject did come up during the briefing of AA/TWA's motion for summary judgment. At one point AA/TWA argued to the District Court, "[A]t most, the appropriate remedy would

be an order compelling the processing of [Appellant's] grievance." Defendants American Airlines Inc.'s and TWA LLC's Memorandum in Support of Their Motion for Summary Judgment at p. 7 n.4. (Jt.Supp.Apex. 11). Appellant responded, "To the extent AA suggests its willingness to arbitrate this dispute, a position it has asserted only by implication in its motion for summary judgment, Susan Smith readily agrees." Plaintiff Susan Smith's Memorandum in Opposition to Defendant Airlines' Motion for Summary Judgment at p. 7 (Jt.Supp.Appx. 28). Thus, were Appellant allowed to amend her complaint to seek an order compelling arbitration, Appellant would not be introducing a completely new matter into this case.

13. In addition, Appellant should not be penalized for not having previously directly asked the District Court to compel arbitration because it was not completely clear that Appellant, as an individual employee, separate and apart from her union, had the legal right to do so. This Court stated, "A federal court may compel arbitration at the employee's (or the union's) request." Opinion at p. 6. In fact, while Appellant believes that the quoted sentence correctly states the law, the matter was not entirely free from doubt. In *Pyles*, the Court noted that railroad employees undeniably "have standing individually to pursue claims before the National Railroad Adjustment Board." *Pyles*, 79 F.3d at 1052 n.9. The Court went on say, "Whether airline employees also have a right to pursue claims individually is less clear." *Id.* The *Pyles* Court concluded that "individual airline employees *are* entitled to convene special boards of adjustment as a matter of statutory right." *Id.* (emphasis in original). Nevertheless, as far as Appellant is aware, this Court had never previously held that an individual airline employee may sue to compel arbitration. Now that this

Court, for the first time, has done so, and now that Appellant is on notice that such a remedy is available to her, she should be permitted to ask the District Court for leave to amend her complaint and request an order from the District Court compelling arbitration. *See Dartmouth Review v. Dartmouth College*, 889 F.2d 13, 22-23 (1st Cir. 1989) (amendment after appeal may be appropriate where, *inter alia*, "some new concept has surfaced, making workable an action previously in the doldrums"), *overruled on other grounds, Educadores Puertorriquenos en Accion v. Hernandez*, 367 F.3d 61 (1st Cir. 2004).

WHEREFORE, for the foregoing reasons, Appellant respectfully requests that this Court grant a panel rehearing herein and that, pursuant to Rule 40(a)(4)(A) of the Federal Rules of Appellate Procedure, this Court, without reargument, remand the case to the District Court to allow the District Court to consider whether Appellant should be granted leave to amend her complaint and seek an order compelling arbitration. In the alternative, Appellant requests that this Court, either with or without reargument as this Court may deem appropriate, remand this case to the District Court with directions that Appellant be granted leave to amend her complaint and seek an order compelling arbitration.

CAPES, SOKOL, GOODMAN,
& SARACHAN, P.C.

By: /s/ Sanford J. Boxerman

Sanford J. Boxerman
7701 Forsyth Blvd.,
Fourth Floor
St. Louis, MO 63105
(314) 721-7701
(314) 721-0554 (fax)

CERTIFICATE OF SERVICE

A copy of the foregoing was mailed via first class mail on this 27th day of July, 2005, to Clay Warner and Marta Wagner, Legal Department, Air Line Pilots Association, 535 Herndon Parkway, Herndon, VA 20170, Larry M. Bauer, Stinson, Mag & Fizzell, P.C., 100 South Fourth Street, Suite 700, St. Louis, MO 63102, Columbus R. Gangemi and Jr., Michael P. Roche, Winston & Strawn, 35 West Wacker Drive, Chicago, IL 60601, Arthur J. Martin and Charles A. Werner, Schuchat, Cook & Werner, 1221 Locust Street, Second Floor, St. Louis, MO 63103, and David H. Luce, Carmody MacDonald, 7733 Forsyth Blvd., Suite 1600, St. Louis, MO 63105.

/s/ Sanford J. Boxerman

45 U.S.C. § 184. System, group, or regional boards of adjustment

The disputes between an employee or group of employees and a carrier or carriers by air growing out of grievances, or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on April 10, 1936 before the National Labor Relations Board, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to an appropriate adjustment board, as hereinafter provided, with a full statement of the facts and supporting data bearing upon the disputes.

It shall be the duty of every carrier and of its employees, acting through their representatives, selected in accordance with the provisions of this subchapter, to establish a board of adjustment of jurisdiction not exceeding the jurisdiction which may be lawfully exercised by system, group, or regional boards of adjustment, under the authority of section 153 of this title.

Such boards of adjustment may be established by agreement between employees and carriers either on any individual carrier, or system, or group of carriers by air and any class or classes of its or their employees; or pending the establishment of a permanent National Board of Adjustment as hereinafter provided. Nothing in this chapter shall prevent said carriers by air, or any class or classes of their employees, both acting through their representatives selected in accordance with provisions of this subchapter, from mutually agreeing to the establishment of

a National Board of Adjustment of temporary duration and of similarly limited jurisdiction.

(May 20, 1926, c. 347, § 204, as added Apr. 10, 1936, c. 166, 49 Stat. 1189.)

Fed.R.Civ.P. 15. Amended and Supplemental Pleadings

(a) Amendments. A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

* * *